Supreme Court of the United States

OCTOBER TERM, 1964

No. 345

STATE OF MARYLAND, for the use of NADINE Y. LEVIN, *et al.*,

Petitioners,

– vs –

UNITED STATES OF AMERICA,

Respondent.

STATE OF MARYLAND, for the use of SYDNEY L. JOHNS, *et al.*,

Petitioners,

– vs –

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONERS

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Introduction

In its brief (hereinafter referred to as U.S. Brief) the United States takes the position that McCoy was not an employee of the United States either in his capacity as a civilian technician caretaker of federal property employed under 32 U. S. C. §709(a) or in his capacity as a military

member of the Maryland National Guard. The Government further contends, in the alternative, that if McCoy was an employee of the federal government for some purposes, "he was not subject to any federal direction or control or engaged in any function of the federal government" while making the flight in question (U.S. Brief 10).

The argument by respondent, that civilian caretakers of federal property employed pursuant to an act of Congress, 32 U. S. C. §709(a), are not employees of the United States, has been answered fully in the brief on behalf of petitioners and in the amici curiae brief. So also has the question whether McCoy was acting in the scope of his federal employment.

Respondent rests its argument upon the "militia" clause of the Constitution whereas we are here concerned only with a civilian caretaker as distinguished from a member of the National Guard; respondent argues that the relationship of the National Guard of each state to the federal government is essentially that of "a party and an independent contractor." To begin with, the independent contractor argument is irrelevant for we are dealing with the employment of McCoy by the United States pursuant to a specific federal statute, as its trained technician caretaker of its own costly and complicated military aircraft, and the maintenance of the same pursuant to prescribed U.S. Air Force standards. The "independent contractor" argument also fails against the massive structure of federal statute, regulation and integrated organization of the National Guard as an essential part of our national defense system, all fully discussed in our main brief. To liken each state unit of the National Guard to an independent contractor is to convert our National Guard defense system into fifty independent standing armies.

The petitioners and amici curiae have discussed in detail the evidence showing that McCoy, as the person

in charge of all maintenance of federally owned airplanes allocated to the unit, and in charge of all maintenance personnel of said equipment, was performing his civilian caretaker duties at the time of the occurrence.

Respondent's rather oblique approach to the facts is characterized by its statement on page 3 of its brief:

> "In this Court the United States does not challenge the finding of the district court that McCoy's negligence was responsible for the accident."

The fact of the matter is that McCoy's negligence was not contradicted by the United States in the district courts and that the district courts' findings of McCoy's negligence and of the awards of damages in the wrongful death cases were not disputed nor appealed from by the United States. The unsupported assertions made by respondent and its rather incomplete selections from the record render a detailed reply necessary to assist the court in this important case and to insure that there be no confusion about the facts. Reference is made to, among others, an attempt to support respondent's contention that McCoy was at most a "shared" or "borrowed" servant, that he was only under the direction and control of the State (U. S. Brief 12), and respondent's argument concerning the legislative history of an administrative remedy enacted by Congress in 1960 relative to certain claims, and its claim of waiver of the right to assert collateral estoppel.

I.

Generally as to Respondent's Statement of Facts.

Respondent states, after relating the fact that McCoy was a military member of the Air National Guard of Maryland, that he "was also employed as a civilian air technician * * *" (U. S. Brief 3). Thus stated, it is a matter of the "tail wagging the dog." McCoy was a civilian technician-caretaker of federal property employed under 32 U. S. C. §709(a), as Aircraft Maintenance Chief and also acting Maintenance Supervisor, and these civilian jobs were full-time jobs during which he supervised the maintenance of all the aircraft and the work of 75 to 80 civilian maintenance personnel at the base and was paid $7,500.00 annually by the United States. His military duties to which respondent gives primary emphasis represented only part-time work (R. 41; Dist. Ct. Find. 23, R. 697), consisting of 48 four hour periods annually (R. 127) usually served on two Saturdays a month (R. 38) and 15 days afield training (R. 127, 155), for which he was paid approximately $2,000.00 a year by the United States (R. 43). (His military duties also included a maximum of 36 flight training periods of 4 hours each (R. 127) and McCoy had accomplished this maximum prior to the day of the accident (R. 167)). It is not disputed that the accident occurred on a Tuesday, during McCoy's regular civilian work week, and while he was employed in his civilian capacity, and being carried in his civilian pay status at the base (R. 67, 68, 77, 78; Dist. Ct. Find. 26, R. 697, 698) and not during a flying training period (R. 167).

The respondent states that the air maintenance chief was not required to be a rated pilot on flying status nor "was such a qualification listed as desirable" (U. S. Brief 4). This statement ignores the fact that at the

time of the occurrence McCoy was also acting Maintenance Supervisor and that under ANGM 40-01, p. 106, R. 217, under the heading "Qualifications," it is stated as "desirable" that the maintenance supervisor "be a rated pilot on flying status to enable incumbent to make test flights on assigned aircraft." General Wilson, Head of the National Guard Bureau, on active federal duty in that capacity, testified that an air technician and a base commander should both have a flight rating; that it is desirable for the maintenance officer as well as the base detachment commander to have a flying status; that a maintenance officer should be able to check his own airplanes. That ". . . if I were a squadron commander, I would insist on my maintenance officer being a rated pilot. It gives the pilots, the other pilots, certainly a safe feeling if they know the guy that is doing the maintenance is also going to fly the airplane." (R. 306). General Wilson further testified that to keep that flying rating, which he considered desirable for a maintenance chief, it was necessary for him to fly a given number of hours to maintain proficiency in that type of equipment (R. 308).

In fact, there were occasions when it was absolutely necessary to take the airplanes off the ground because maintenance of the equipment could not be checked in any other way (R. 81). Kilkowski, McCoy's immediate superior in his civilian technician job, was employed in a civilian capacity as Base Detachment Commander (air technician) under the same caretaker state as McCoy (R. 122, 123, 511, 512), and Kilkowski testified it was good business to have the head of the maintenance section (McCoy) in a flying capacity, qualified as a test pilot, and as a general pilot in all capacities (R. 605, 606). McCoy also testified it was desirable to have an aircraft maintenance officer who flew the aircraft because if he gets a better understanding of the quality of the mainte-

nance done under his supervision, he is better able to talk to the pilots, to uncover or discover certain discrepancies, and gets better information as to the condition of the equipment (R. 70, 71). Kilkowski testified that it is desirable for a maintenance officer to be a flying officer because there will be better maintenance, safer aircraft, and as a result, a better unit (R. 164).

McCoy testified that at the time of the accident he was flying in his capacity as a caretaker of government property (R. 80). The purposes of flights made by McCoy were often several fold. Any flight he made as an aircraft maintenance technician was to evalute the condition of equipment (R. 70, 139, 140), and insure proper maintenance of the equipment over which he had general supervision.

McCoy also flew functional check flights of the aircraft in his civilian maintenance status. United States Air Force Technical Order 1-1-300 prescribes certain types of functional checks required on aircraft that have undergone certain repairs, and provides for inspection (R. 48). In order to flight check airplanes in accordance with this Technical Order, it was absolutely necessary on occasion to take the planes off the ground. It was part of McCoy's duties to make these flight checks as part of his air technician's civilian job (R. 75, 76, 77, 79).

The flight order under which the particular flight was made (Pltf's Ex. 2, Flight Order No. 105, R. 209) did state in the printed portion of the form that it was "for purpose of maintaining flying proficiency." But this flight order was used for *all flights* regardless of the nature of the flight, including flights in connection with the maintenance of the airplanes (R. 69), and McCoy testified that during a proficiency flight he could, and did, perform the dual function of checking the performance of the equipment and evaluating the quality of the maintenance, and

as Aircraft Maintenance Chief, and as Captain in the Air National Guard, he could perform both these functions as part of the same flight (R. 493-495). During a flight he would check the way the aircraft handled and, in general, would have a better knowledge of the maintenance of the aircraft. These were all aspects of a general proficiency flight (R. 616).

In response to the question whether any officer performing an aerial flight would pay some attention to the maintenance of the aircraft, Kilkowski testified this might be true but that the judgment of a pilot who is not a maintenance officer would not be as qualified as that of a maintenance officer (R. 169, 170), and that there are technicalities to jet aircraft in regard to maintenance that would not mean anything to one who is not a maintenance officer, whereas McCoy, as a maintenance officer, as Aircraft Maintenance Chief, and as a pilot, was more capable of analyzing maintenance problems than the average pilot (R. 169, 170). Flying for proficiency related to McCoy's civilian job because he was required to maintain his proficiency in order to be qualified and competent to check and test aircraft (R. 138, 139). As part of his civilian maintenance job, McCoy performed functional flight checks on April 8, 13, 23, 24, 26, May 4, 10, 15, 16 and 17, 1958 (R. 70). The accident in question occurred on May 20, 1958.

The evidence showed conclusively that at the time of the occurrence McCoy was not flying the jet airplane on a training mission (R. 70, 80, 121, 136, 146, 147, 152, 153, 161, 163, 167, 586, 587). During the course of the flight in question, McCoy checked the efficiency of the equipment and evaluated the quality of the maintenance (R. 162-164, 493-495; Dist. Ct. Find. 21). The particular flight at the time of the accident was part of McCoy's function to maintain proficiency and maintain the equipment (Dist. Ct. Find. 22). In the *Meyers* case, the District Court

found, and the Court of Appeals agreed with that finding, that in his civilian capacity as a caretaker of property of the United States, McCoy, when on the flight in question, which entailed the performance of his caretaker and maintenance duties, was an employee of the United States within the terms of the Federal Tort Claims Act (Dist. Ct. Find. 23; 322 F. 2d 1009, at 1012).

In the light of the foregoing evidence and findings it is remarkable that respondent states to this court (U.S. Brief 4) that after a pilot has qualified for all of his flight pay, he is, when flying, "considered to be on military duty training status without military pay * * *," citing R. 127, 155, 156. The statement is obviously incorrect and examination of the pages of the record cited disclose, insofar as they have any relationship to the matter being discussed, that the witness was testifying, not to the work of a civilian air technician during his regular civilian work week, but to the activity of a member of the Guard present on duty for one of his 36 flying training periods per year, usually performed on a Saturday for "active" or "inactive" duty training on a prescribed training assembly or a prescribed flying training period (R. 154, 155, 156).

McCoy's military pilot's license permitted him to fly the plane, but it did not prescribe the use of the plane at the time of the flight (R. 79, 80). A pilot can do air technician (civilian) work while flying the airplane (R. 163, 164), and McCoy was the only officer maintenance supervisor of aircraft maintenance at the base, at the time of the occurrence, available to perform the necessary task of flying the aircraft to evaluate the equipment maintenance (R. 136, 137). On the day of the flight and during the course of the flight, McCoy was carried on the rolls as an air technician (R. 78), performed the duties of an air technician that day up to and including the time of the accident (R. 67, 78), and at the time of the accident, in his opinion, was flying in the capacity of a caretaker of gov-

ernment property (R. 80). On the flight in question McCoy's purpose was to check the quality control of the product he was maintaining, to evaluate the equipment as to its maintenance, and to maintain proficiency. He had a better opportunity to observe the quality of maintenance of the equipment by flying the plane (R. 70, 399), and during the flight he watched the instruments, observed that the plane was behaving properly, that there were no mechanical difficulties, and that the instruments were functioning properly (R. 120). Kilkowski, McCoy's superior, also testified that on the day of the occurrence, up to the time the accident occurred, McCoy was being paid as an air technician, and that he was performing the duties of an air technician until the accident occurred (R. 136).

Other than the fact that McCoy had to have a military license as a pilot from the United States to have the right to fly the jet airplane owned by the United States, his flying of the airplane at the time and place in question was no part of his work or duties as a military member of the Guard. McCoy had completed his authorized maximum flying for pay for the period involved (36 periods of 4 hours each of flying for purposes of military training), so that he could not earn any flight pay on the occasion in question. (Dist. Ct. Find. 25) He could be present for duty only in one pay status, either civilian or military; he was present throughout the day of Tuesday, May 20, 1958, in his civilian pay status, from the time he reported for duty until he was injured. His civilian work did include flying the airplanes at the base, both to check flight them when checking on specific repair work, and flying them to observe the quality of maintenance as it affected the flight and performance of the airplane, and enabled him to observe whether the maintenance work was being properly done on the airplanes. All maintenance work on the planes was done during the week by the civilian maintenance personnel who were under McCoy's supervision in the performance of that work. That was McCoy's job, all

day, every work day. The maintenance of the planes, like maintenance of any other machinery, could be effectively tested only after the work was done, by operating the machines or, in the case of airplanes, by flying them. McCoy was the chief maintenance officer at the base qualified to fly the planes for this purpose.

THE FOLLOWING FACTS AND CIRCUMSTANCES ESTABLISH THAT McCOY WAS ACTING IN THE COURSE OF HIS CIVILIAN EMPLOYMENT AS A MAINTENANCE SUPERVISOR OF FEDERAL PROPERTY AT THE TIME OF THE ACCIDENT.

1. McCoy was employed under the provisions of 32 U. S. C. §709, and was sent by the Air Force, to an Air Force School at Chanute, Illinois, to be trained to fill the job of a maintenance supervisor. He was paid by the United States while attending the school.

2. McCoy's entire salary for his full time air technician civilian maintenance job was paid by the United States.

3. He took an oath as an officer of the National Guard that he would obey the orders of the President of the United States, and the Governor of the State of Maryland, as required by 32 U. S. C. §312 (R. 492).

4. He received federal recognition which permitted him to hold his National Guard civilian job, and to receive federal pay. This recognition could be withdrawn by the United States at any time when in its opinion he ceased to have the qualifications required under 32 U. S. C. §301, or cease to be a member of a federally recognized unit, 32 U. S. C. §323. This would terminate his employment.

5. Under the requirements of 32 U. S. C. §324, it was compulsory that he be discharged from the National Guard if his federal recognition was withdrawn. Any right of the State to discharge him as an officer of the Guard was subject to the superior right of the federal government to compel his discharge by withdrawal of his Federal recognition under 32 U. S. C. §324.

6. The federal government owned and provided the airplane which McCoy was flying at the time of the occurrence, and it was subject to its ultimate control.

7. The federal government furnished and paid for the fuel used to operate the plane McCoy was flying. (Dist. Ct. Find. 3)

8. The federal government paid for all repairs, upkeep and maintenance of the airplane involved. (Dist. Ct. Find. 3)

9. The flight suit he wore during the flight was that required by the United States Air Force (R. 402).

10. The day of the week on which the accident occurred, Tuesday, was a day when McCoy always worked at his full time civilian job. (Dist. Ct. Find. 13)

11. He reported for duty that Tuesday morning at 8 o'clock in his civilian capacity. "This was a non-military day" (R. 396).

12. He was carried on the books for that day in his civilian pay status.

13. The work he performed that morning at the base prior to the flight involved solely his civilian work and duties. (Dist. Ct. Find. 26)

14. He examined the maintenance records pertaining to the aircraft that day before making the flight (R. 490).

15. The civilian work of the maintenance supervisor includes flying the airplane for purposes of better maintenance of the airplanes. (Dist. Ct. Find. 20)

16. At the time of the accident, McCoy was flying the airplane in an area authorized for a civilian caretaker from that base, during the regular working hours of a

civilian caretaker, and for a purpose for which a maintenance supervisor was authorized to fly the plane (R. 399).

17. Following the accident, after due investigation, a federal employee, Col. Ebaugh, United States Property and Fiscal Officer, certified that McCoy "was working as a civil employee of the United States at the time of the injury and *not* as a member of the Maryland National Guard."

18. Following such certification McCoy's claim for benefits under the Federal Employees' Compensation Act was duly processed, investigated by the Bureau of Employees Compensation of the United States Department of Labor, which adjudicated that McCoy was in the performance of his duty as an employee of the United States at the time of the accident.

The statement in respondent's brief that an officer of the Guard who is also a civilian air technician flies the airplane "in his military capacity" (U.S. Brief 5) cannot be helpful to this Court in determining what work McCoy was actually doing at the time of the occurrence. And the testimony of McCoy, partially quoted at p. 5 of respondent's brief, does not include other qualifying and significantly explanatory testimony by the witness on the subject.

We quote fully on this point from the record beginning at the bottom of page 117:

> "Question. Well, normally. In other words, when you are in the airplane you are really functioning in both capacities?
>
> "Answer. It is my belief that as an air technician when I get in an airplane I become a Captain in the Air National Guard, or I am a Captain in the Air National Guard qualified by the Department of the

> Air Force and its regulations to operate the aircraft, but I still have the responsibility as an aircraft maintenance chief to evaluate the condition of the aircraft."

Footnote 2 on the same page 5 of respondent's brief similarly requires correction. Respondent challenges as inaccurate petitioner's assertion that McCoy took his orders in his military status from Major Scott. The record shows the following at page 42:

> "Q. From whom did you take orders while in the military status? A. From the squadron commander—could I have my memory refreshed?
>
> "Q. Would that be Major Scott, as your deposition set forth? A. Major Scott."

And the foregoing review of the evidence demonstrates that in these particular cases it is not accurate for respondent to state to the Court (U.S. Brief 6) that the flight order directed McCoy to make a proficiency or "training flight," because under the particular circumstances, the terms "proficiency" and "training" are not really synonymous, even though there are times when the two terms might properly be used interchangeably.

The respondent, aware of the crucial aspect of this point, states in a footnote (U.S. Brief 6) that "petitioners' assertion that the flight 'was not a training mission' (Pet. Brief, p. 17) is incorrect, as shown above." This precise distinction was considered by the District Court for the District of Columbia in the *Meyers* case, when the court specifically found that "an aeronautical rating only allows a man to fly the aircraft if he obtains permission to do so. It does not determine his purpose or the work he is properly doing in flying that aircraft." (Dist. Ct. Find. 18), that during the course of the flight McCoy was checking the efficiency of the equipment in order to determine if it was working properly (Dist. Ct. Find. 22), that the

particular flight at the time of the accident was part of his function to maintain proficiency and maintain the equipment (Dist. Ct. Find. 23), that his work in flying the airplane could involve performance in a dual (military and civilian) capacity (Dist. Ct. Find. 25), and that in flying the airplane at the time of the occurrence, McCoy "was *at least* in part carrying out his civilian work as Aircraft Maintenance Chief and Acting Maintenance Supervisor of the Base" and was therefore an employee of the United States acting within the scope of his employment at the time of the occurrence (Dist. Ct. Find. 35). The court of appeals in the *Meyers* case also carefully recognized this distinction, and held that the findings of the district court on these points were "supported by the evidence, that the flight was within the caretaker function when the accident occurred" 332 F. 2d 1009, at 1012, footnote 3. The District Court for the Western District of Pennsylvania in the *Levin* and *Johns* cases made substantially the same findings (Dist. Ct. Find. 17, 21, 22, 24, 34; R. 696-699).

II.

As to respondent's claim that the court below did not find it necessary to set aside any specific district court finding.

Respondent states (U.S. Brief 9, footnote 6) that the opinion of the Court of Appeals, Third Circuit, "noted that less than usual weight should be given to the findings of the district court * * *" To be accurate, respondent should have conceded that the court of appeals gave no weight to the district court findings. The court stated, 329 F. 2d 722, at 723:

> "We are in as good a position as was the trial court to evaluate the evidence, draw the inferences of which

the evidence is reasonably susceptible, and decide the critical questions raised on this appeal."

The district court made specific findings in the *Levin* and *Johns* cases that McCoy was acting in his civilian caretaker capacity, performing the duties of his civilian job when flying the aircraft at the time of the accident, and was acting in the scope and course of his employment as an employee of the United States. The Third Circuit held that McCoy "was not acting within the scope of his employment as a maintenance technician but was acting within his line of duty as a commissioned aeronautical officer of the Guard" (329 F. 2d 722, at 731), and that even in his capacity as a maintenance technician he was an employee of the State of Maryland " " and "not a federal employee within the meaning of the Federal Tort Claims Act." (329 F. 2d 722, at 729).

This holding is diametrically opposed to the unanimous holding on the same facts and issues in the *Meyer* cases:

> "We hold with the District Court that in his civilian capacity as a caretaker of property of the United States Captain McCoy when on this flight, which entailed the performance of his caretaker and maintenance duties, was an employee of the United States within the terms of the Federal Tort Claims Act." (p. 1012)
>
> "Not only was the Captain an employee of the United States but he was also 'acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law' of Maryland where the negligence occurred." (p. 1014)

The above are in accord with the specific findings of the District Courts in *Meyer* and *Levin*.

Yet, in this state of the record, respondent states to this court that the Court of Appeals in the Third Circuit, "did not, however, find it necessary to set aside any specific District Court finding." (U.S. Brief 9, footnote 6). In fact, the court below clearly disregarded these findings and proceeded to make its own findings of fact.

Petitioner's counsel has carefully read the latter half of footnote 6 on page 9 of Respondent's Brief, and confesses that it is still not clear what respondent is attempting to convey in its rather oblique inferences. It should be stated however that there is nothing inconsistent in the findings of the District Court below with the dual status of McCoy, which it particularly noted. The findings were also specifically approved in the dissenting opinion of Judge Staley. Is respondent suggesting that the government is liable in *Meyer* and not in *Levin*?

III.

As to respondent's admissions in its briefs that McCoy was acting in a civil maintenance capacity.

Respondent has not seen fit to answer or comment on its admissions in its briefs previously filed in these cases and in the *Meyer* cases, admissions which are set forth on pp. 20 and 21 of the Brief on Behalf of Petitioners. It was there shown that respondent admitted in its briefs in the lower courts that McCoy was, in fact, acting *at least in part* in his civilian capacity at the time of the occurrence, engaged in maintenance activity, admissions which the majority of the court in the Third Circuit apparently overlooked or misconstrued when that court held that McCoy "was not acting within the scope of his employment as a maintenance technician * * *" and that it was "of no relevance" that McCoy was carried on the

payroll in his civilian status from the day of the occurrence, or that on the flight in question, he checked performance of the aircraft and reported thereon; 329 F. 2d 722, at 731. Judge Hastie, in his concurring opinion, likewise apparently completely overlooked these admissions by respondent in its briefs; otherwise, he would not have held that the flight "was not an undertaking of a civilian caretaker in performance of his responsibility for aircraft maintenance" 329 F. 2d 722, at 731.

Furthermore, Judge Staley in his dissenting opinion, as reported, footnote 1 on page 734, noted that the government brief stated:

> "Both Captain McCoy and Lt. Col. Kilkowski testified that in their opinions they believed that Captain McCoy was performing duties in his civilian capacity as well as his military capacity, at the time of the accident."

Respondent admits (U.S. Brief 54) that on the flight in question McCoy, "in his civilian capacity as air technician, observed the performance of the aircraft and its equipment, as well as other mechanical aspects of the flight. This, as his commanding officer stated, was 'a secondary portion of any flight.'"

It should be observed that this represents a change by the respondent from its position on this issue as set forth in the Pretrial Order in the District Court in the *Meyer* cases that the position of the United States on the agency issue was that "while making this flight, he (McCoy) was performing *no duties* of his civilian employment. . . ." (*Meyer* cases, U.S. Court of Appeals for the District of Columbia Circuit, No. 16,953, etc. Joint Appendix 14). The conduct of a servant is regarded as within the scope of his employment if it is the kind of work he is employed to perform, if it occurs substantially within the authorized

time and space limits, and if it is actuated, *at least in part,* by a purpose to serve the master. Restatement of the Law of Agency, 2d §228, p. 504 (1958).

IV.

As to respondent's contentions that the court in the *Holly* case was mistaken in its assumptions of fact.

Respondent urges that civilian caretakers are only under the control of state officers (U.S. Brief 20, 21), that adjutants general are state employees (U. S. Brief 21, 45-47), and that the Secretaries of the Army or Air Force were only authorized by Congress to "designate" state officials to employ caretakers, and never had authority to actually employ caretakers, and that the Tenth Circuit was mistaken in the *Holly* case, 192 F. 2d 221, at 222, when it believed authority to employ caretakers was vested in the Secretary of the Army or the Air Force and "delegated" to adjutants general by regulation (U. S. Brief 46). There was no "mistake of fact" by the Tenth Circuit in the *Holly* case, or on the part of the many judges of other courts of appeal who agreed with the holding in the *Holly* case.

32 U. S. C., §709(a), which authorized the employment of "Caretakers and Clerks" provided, in pertinent part, that:

> "Under such regulations as the secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament and equipment of the Air National Guard. A caretaker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker."

Section 709 (b) provided that enlisted members of the Guard "and civilians" may be employed as caretakers under this section.

Section 709 (f) stated that the secretary shall fix the salaries of clerks and caretakers and designate the person to employ them.

National Guard Regulation No. 75-16, December 29, 1947, Plaintiffs' Exhibit 15 (R. 634-645), promulgated by the United States, provided that accounting clerks and caretakers of federal material and equipment provided for the National Guard are employees authorized under § 90 of the National Defense Act (the forerunner of 32 U. S. C. § 709). This regulation stated:

> "The Secretary of the Army has *delegated* to the several adjutants general of the States, Territories and the District of Columbia, authority to employ, fix rates of pay, establish duties and work hours (not to exceed 40 hours per week), and to discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may from time to time be issued by the chief, National Guard Bureau." (R. 635). Appendix A-5, Brief on Behalf of Petitioners. (emphasis ours)

National Guard Regulation No. 75-16, January 7, 1953, (R. 647), Appendix A-8, Brief on Behalf of Petitioners, states that these regulations outline the qualifications, duties, rights, and obligations of certain designated personnel (including the caretakers here under consideration) and again states that the Secretary of the Army has "delegated" to the adjutants general the authority to employ, fix rates of pay, establish duties and work hours, etc.

Air National Guard Regulation No. 40-01 (ANGR 40-01) (R. 652), Appendix A-9, Brief on Behalf of Petitioners,

provides in § 3. Authority, that "Basic authority" for the employment of civilian personnel is contained in § 90 of the National Defense Act, and that this authority is "delegated" to the adjutants general, as previously indicated, subject to the provisions of law and such instructions as may be subsequently issued by the National Guard Bureau. The Air National Guard manual 40-01 (ANGM 40-01), Plaintiff's Exhibit 3 (R. 210), Appendix A-11, Brief on Behalf of Petitioners, issued by order of the Secretary of the Air Force, by the Chief of the National Guard Bureau, states that the manual will govern all civilian employees of the guard, and the manual sets forth in detail the duties and responsibilities of these civilian personnel including the maintenance supervisors and the aircraft maintenance chiefs.

It is clear that the court in the *Holly* line of cases did not err in holding that the authority to employ caretakers was vested in the Secretary of the Air Force and was "delegated" to the adjutants general by federal regulation. The Act of Congress, the orders of the National Guard Bureau, a federal agency, issued pursuant to orders of the Secretary of the Army, and then by authority of the Secretary of the Air Force, all unequivocally indicated that the authority to employ the civilian personnel of the Air National Guard was reposed in the federal government and was delegated by the National Guard Bureau to the adjutants general, subject to continuing federal supervision and control. The Secretary of the Air Force and the National Guard Bureau could not delegate authority to the adjutants general unless they had the authority to do those acts which they delegated to lower levels for purposes of administrative convenience.

ANGM 40-01 (Pltfs.' Ex. 3, R. 210) issued by order of the Secretary of the Air Force, March 1, 1958, by the

Chief of the National Guard Bureau provides that the provisions of the manual "will govern all National Guard civilian employees . . ." (p. 211) and further states, p. 214, that:

> "3. Delegation of Authority.
>
> The authority of the National Guard Bureau to regulate the employment and rates of compensation is contained in Department of the Army General Order 96, dated 9 November 1951, subject, 'Delegation of Authority for the Employment and Fixing of Salaries for all Caretakers and Clerks in the National Guard Bureau.'"

The manual further provides, contrary to respondent's statement that "the only federal duty" imposed upon adjutants general is to make returns and reports to the Secretaries (U. S. Brief 21) as follows concerning the adjutants general (R. 214):

> "5. Responsibility
>
> a. Adjutants general of various States, Territories, Puerto Rico or the District of Columbia will be responsible for:
>
> (1) Insuring that the requirements and policies of the Air National Guard position classification program are followed at all air technician detachments.
>
> (2) Furnishing recommendations, suggestions, and information to the National Guard Bureau on matters pertaining to classification standards, or on policies, techniques, and procedures affecting the position classification program.
>
> (3) Maintains contact with the Civilian Personnel Office at nearest military installation and assists him in gathering information necessary for proper adjustment of the locality pay schedule."

The manual then sets out in detail the responsibility of the base detachment commandant for senior air technician.

The manual then further states there are two major categories of positions in the National Guard Air Technician Program, the National Guard Classified (NGC) type and the National Guard Maintenance (NGM) type. The job of maintenance supervisor is part of the NGC listing, job No. 43-00, and the manual states that the National Guard Bureau is guided by the Classification Act of 1949, and pay rates for this category are controlled by Congressional action. McCoy was the acting maintenance supervisor at the base at the time of the occurrence, and formerly had been the maintenance supervisor until a few days before the accident.

Similarly, the job of Aircraft Maintenance Chief is described in the manual (R. 218) as a job of grade NGMS-9, Job No. 43-10. The manual states that this category of job is characterized by trade, craft, maintenance and labor type positions, similar to the United States Civil Service Wage Board positions, and pay rates are adjusted by periodic surveys conducted by the Army-Air Force Wage Board. The third category under the NGM heading is "National Guard Maintenance-Supervisor" (NGM-S) and the manual states that it includes technically skilled positions primarily concerned with direct supervision of the duties and tasks assigned to the employees in positions indicated in the manual, referred to as National Guard Maintenance, and National Guard Maintenance-Leader. The manual further states that a copy of it will be available for review and reference by supervisors and employees, and that ready access to it is "essential" for an understanding by Air National Guard civilian and military commanders of the responsibilities of Air National Guard civilian personnel (R. 215).

Air Force Regulation 45-2 (AFR 45-2), issued by the Department of the Army and the Air Force, April 13, 1949 (Pltfs.' Ex. 7, R. 233), entitled "National Guard General Provisions," states that the National Guard Bureau is charged with administering approved joint Army and Air Force policies other than those relative to training when those policies are applicable to both the Army National Guard and the Air National Guard, not in federal service, and with promulgating joint Army-Air Force directives and regulations applicable to both the Army National Guard and the Air National Guard, including those relating to training (R. 233, 234). AFR 45-2 further provides that the National Guard Bureau will from time to time publish joint National Guard Regulations which:

> "will govern the Army National Guard and the Air National Guard when not in Federal service in the same manner as Army Regulations or Air Force Regulations govern the Regular components of the service." (R. 235).

AFR 45-2 further provides:

> "National Guard Regulations pertaining to the Air National Guard only will be issued subject to the approval of the Chief of Staff, United States Air Force." (R. 235, 236).

Respondent asserts that if Congress had agreed with the *Holly* line of cases, that negligence of civilian personnel of the National Guard was covered by the Tort Claims Act, it would not have found it necessary to provide an administrative remedy for claims based on negligence of such personnel (R. 39). The respondent also argues that by treating military and civilian personnel on the same basis, Congress must have accepted the view that the Guard was under state rather than federal

control and was not accepting the *Holly* line of decisions. The argument is untenable. The legislation itself merely provided for administrative procedures to permit recovery up to $5,000.00, and that anything beyond that amount would be submitted to Congress. This legislation did nothing more than provide a limited administrative recovery and does not purport to overrule or replace the judicial remedy available under the *Holly* line of cases. Respondent apparently refuses to stand behind the statement of its Deputy Attorney General when the proposed legislation was under consideration, a statement which, as Judge Fahy pointed out in the *Meyer* cases, was repeated virtually verbatim by the First Assistant, Civil Division, Department of Justice, before a House Committee on the Judiciary (the Deputy Attorney General's statement was made to the Chairman of the Senate Committee on the Judiciary), in which the Congress was advised that the legislation in the form in which it was then being proposed, to include civilian employees of the National Guard employed under 32 U. S. C. §709 within the definition of "employee of Government," was unnecessary because the Government's responsibility already exists under the Federal Tort Claims Act; that "an unbroken series of court decisions" had so held.

V.

As to respondent's version of the "caretaker statutes" history and the intent of Congress.

Respondent discusses the history of the caretaker statutes, asserts that Congress intended only to allow the Secretary of the Army or Air Force to designate State officials to employ caretakers, and that these caretakers are not to be considered federal employees. But there is nothing in any of the legislation to which respondent re-

fers that warrants its final conclusion that the caretakers should be considered state and not federal employees.

As the court of appeals pointed out in the *Meyer* cases, 322 F. 2d 1009, at 1013:

> "In his (McCoy's) property maintenance function he was paid by, and the ultimate right of control over him was in, the United States. The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States though it may be said to have been ancillary thereto. * * * There is of course a close relationship between the State of Maryland and the United States in the maintenance of federal property allocated to the Maryland National Guard, but this does not tip the balance toward the State on the issue of employment; for too much begins and remains with the United States in the case of these caretakers of federal property."

And, further:

> ". . . [I]n an ultimate sense the right of control was in the Federal Government at the time and in the circumstances of this accident, notwithstanding immediate authority or permission for the flight was given by the State through its militia officers."

The respondent further argues that in rejecting a bill to extend coverage of the Tort Claims Act to Guard personnel in 1960, Congress indicated that civilian caretakers were state and not federal employees (U.S. Brief 24, 25, 37, 38, 39). And respondent argues that in this legislation in 1960, Congress treated civilian employees of the Guard as well as military members as employees of the state "in the very context of the Federal Tort Claims Act" (U.S. Brief 37). This identical contention was rejected as unsound by the court of appeals in the *Meyer*

cases, 322 F. 2d 1009, at 1013, where the court pointed out that this argument by the Government:

> ". . . [C]learly misses the significance of the position of the Deputy Attorney General insofar as the present case is concerned. The thrust of his objection to the proposed legislation, S. 1764, 86th Cong., 2d Sess. (1960), which would have amended the Tort Claims Act as to both classes of persons, was that it would change existing law as to federal liability for acts of Guardsmen when on regular training duty under State control. As to the provision expressly including civilian caretakers under the term 'employees of the Government,' his position was that it was unnecessary because it would merely restate existing law." See footnote 4 of the opinion.

The court further pointed out that the distinction between members of the National Guard and persons employed pursuant to §709 is also noted in hearings before a subcommittee of the House Committee on the Judiciary (322 F. 2d at 1014), where the first assistant, Civil Division, Department of Justice, made a statement concerning §709 employees identical to the terms used by the deputy attorney general. The new statute did not add to the coverage of the Tort Claims Act, and with respect to injuries caused by civilians employed under §709, the new statute merely created a limited administrative recovery as an alternative to the traditional judicial one under the Federal Tort Claims Act, an administrative remedy which could have no application to the claims of the petitioners in these cases which arose in 1958 (322 F. 2d 1014, and footnote 5). In passing, it may be noted that the Third Circuit, in the *Levin* and *Johns* cases, attached no importance whatsoever to this argument of the Government concerning the 1960 legislation.

There is no valid basis for respondent's contention that Congress considered civilian personnel as state employees or that they are as much under state "command and control" as Military Guard members. The United States does not contend that passage of 74 Stat. 878, Public Law 86-740, which took place more than two years after the occurrence in question, in any way impairs whatever right petitioners have to recover under the Federal Tort Claims Act, and merely argues that the passing of this law shows the intent of Congress prior thereto to regard "caretakers" in the same light as "members" of the Air National Guard. It seems clear that under the provisions of §90 of the National Defense Act of 1916, and its amendments, the position of caretaker is created by Act of Congress, the federal funds for his pay come from money allotted by the Secretary of the Air Force, paid through the National Guard, and the compensation to be in addition to any compensation authorized for members of the National Guard. The Secretary of the Air Force has prescribed regulations concerning the employment of caretakers, fixed their salaries and designated by whom they shall be employed.

The House of Representatives, Report 297, 34 Cong., 1st Sess., clearly illustrates the power of Congress to organize, arm and discipline the militia and points out the fact that the states have only the authority to appoint officers and to train them. While the state may superintend the actual drill and instructions of the National Guard, observance of all things which go to make up military discipline must be according to federal standards.

The Government refers to House Report No. 1031, 69th Cong., 1st Sess., and states "the purposes of the amendment were to secure the more efficient maintenance and care of airplanes and to supply an officer constantly on duty . . . for the supervision of flying training". On

p. 5 of this report as an illustration of this, the Committee discusses the power and authority of the federal government to organize, discipline, govern, and use the National Guard under the Constitution. It says:

> "Save and except the appointment of officers reserved to the states, but one power remains in the states, and that is to train the militia according to the discipline prescribed by Congress. What does this mean? It means that while the states shall superintend the actual drill and instruction of the National Guard such instruction must be according to the discipline prescribed by Congress; that is to say, the method of drill and instruction, and the observance of all things which go to make up military discipline must be according to federal standards. To use a homely illustration, the case is as though the federal government should state to the States: 'You must educate your children in certain schools; you may name the teachers, provided such teachers present the qualifications we prescribe; these teachers may instruct your students, provided they use our textbooks, the course of study we prescribe, the length of hours of recitation we elect, examine them according to our requirements and mete out such punishment for their delinquencies as we designate.' It would seem that under these conditions the school would be rather largely controlled by the federal headmaster."

It is submitted that there is no convincing basis for saying that a civilian caretaker is not an employee of the United States. Congress has had many opportunities to so state prior to and since the decision in the *Holly* case, and has not done so, although the point has been raised in the courts on numerous occasions, and the difference of viewpoint on this question between certain departments of the Government has actually been brought to the atten-

tion of Congressional Committees. It is apparent that on each occasion when the question has arisen, the Congress has accepted the decisions of the courts on this issue. No one who has read the statute, and the regulations and manuals, and has studied the activities of the civilian caretakers, can soundly contend that the civilian caretaker of federal property is a state employee. In every sense of the word he is a federal employee.

VI.

As to respondent's "independent contractor" argument.

The respondent argues that the fact the federal government prescribes conditions for federal support does not mean air technicians in their civilian capacity are employees of the United States under the Tort Claims Act, and seeks to draw an analogy between civilian employees maintaining federal property under federal regulations and control and employees of independent contractors who respondent states are excluded from the Tort Claims Act (U.S. Brief 22). 28 U. S. C. §2671 does provide that "federal agency" does not include any contractor with the United States, but it does not exclude liability of the United States under the Act where it retains sufficient right to control the doing of the work by the so-called independent contractor. In *State of Maryland, for Use of Pumphrey* v. *Manor Real Estate & Trust Co.*, 176 F. 2d 414 (4th Cir. 1949), the Public Housing Authority had leased premises from the owner, had sublet to defense workers, and had employed a management agency to operate the premises. The Government contended the management agent was an independent contractor and not an employee of the United States. The court held that the detailed supervision which the managing agent was subject

to by the Public Housing Authority, and his agreement to be bound by regulations issued by the Government, constituted him an employee for whose acts the United States was responsible under the Tort Claims Act. In *Strangi* v. *United States*, 211 F. 2d 305, 308 (5th Cir. 1954), relied upon by respondent, the Government, in constructing Whitney Dam and Reservoir on the Brazos River, entered into a written contract with one Mayfield to clear brush, timber and trees from the Reservoir area, and Mayfield in accordance with the contract burned the brush and timber he cleared. A fire originating on the border of the Reservoir area burned over and destroyed the properties of the appellant. In an action brought under the Federal Tort Claims Act, the Government showed that Mayfield furnished his own material and appliances, employed his own help, approximately 75 men, and was doing the work as the best bidder pursuant to his calling as a general contractor, was to be paid a lump sum for the specific job and would be penalized for delay in completing the work. The Government did impose certain regulations for the doing of the job, and the court pointed out p. 307:

> "The distinction between the master-servant and independent contractor relationship lies largely in the degree of control or right of control retained by the employer over the details of the work as it is being performed, but there is no definite and absolute rule."

The court held Mayfield was an independent contractor, and with respect to the contention of the claimants that there was negligence on the part of direct employees of the Government, the reviewing court held that the district court's findings of fact of no negligence on the part of the United States were not clearly erroneous, Rule 52 (a), Federal Rules of Civil Procedure, and would not be disturbed. Respondent also cites on this question *United States* v. *Silk*, 331 U. S. 704, 712. That case in-

volved the question whether certain persons were employees within the meaning of the Social Security Act, and although the tests for the distinction between an employee and an independent contractor, or between an agent and an independent contractor, are discussed, the court stated that to effectuate the purposes of the act it rejected the "technical concepts" governing an employer's legal responsibility to third persons for acts of the employer's servant, a concept referred to as the "power of control." The individuals concerned were held independent contractors. They were driver-owners of trucks, small businessmen who owned their own trucks, hired their own helpers, in one instance hauling for a single business and in the other hauling for any customer. There is nothing in the *Silk* case which offers any valid support for respondent's defense in the present cases.

Nor do the myriad of state programs and enterprises for which the federal government has furnished funds administered by the states throw any true light on the relationship existing between the United States and civilian employees hired under the authority of and pursuant to 32 U. S. C. §709 to maintain and take care of federally owned property allocated to National Guard Units. (The United States by Act of Congress established this special class of "caretaker" to take care of federal property allocated to National Guard units that the military members of the unit could not properly take care of themselves.) Col. Kilkowski explained that the duties of the air technicians were to provide continuity, during the week, of plans and programs of the units by doing all those things the units could not do in their military status, such as maintain the aircraft. The military units only met for four periods a month and naturally could not maintain the aircraft or maintain all the records associated with the military, so the civilian technicians at the base did this work in accordance with the Air Force

regulations, providing administrative and maintenance services (R. 123, 124).

According to General Wilson (R. 292), these air technicians, hired under Sec. 709 are full-time civilian personnel,

> "who are placed there to maintain federal equipment and records to the prescribed standards of the Air Force that cannot be maintained by the normal personnel assigned to the active establishment, I mean to the active Guard unit."

The Air Guard program is unquestionably vital to the national defense of this country, and the importance of the air-technician plan to a success of the Air Guard program was emphasized by General Wilson, Chief of the National Guard Bureau (Hearings before House Appropriations Committee, 84th Cong., 2nd Sess., Vol. 4, relative to Dept. of Air Force appropriation for fiscal year 1957, p. 1000) where the following occurred, General Wilson speaking:

> "We think the air-technician plan is one of the big reasons we have had the success which we have had in the Air Guard program.
>
> Mr. Mahon: You think it has been helpful from the standpoint of maintenance of the airplanes, and from the standpoint of safety, and so forth?
>
> Gen. Wilson: Yes, sir; we think by having these people there year in and year out that they increase the capability of maintaining airplanes because we send them to school, and they know they will come back to work on the equipment we have. I think, personally, the reason we have been able to fly the F-89

and the F-84-F—the high-performance aircraft—is because of the maintenance capability we have. * * *"

It is not fairly analogous to compare federal assistance to what are primarily state projects with federal control over the Air National Guard which Congress has described, 32 U. S. C. §102, "as an integral part of the first line defenses of the United States . . . , "or with civilian personnel employed to maintain federal property, when the Air National Guard could not exist or function without the said maintenance and without the said federal property and equipment.

Respondent asserts that the regulations imposed by the United States over activities of Guard units is similar to the control exercised by a party over the conduct of employees of an independent contractor, but that state officials, although given specifications to meet, retain ultimate control over the supervision and direction as well as the hiring, discharge and working conditions of the employees (U.S. Brief 52). Respondent can only make an argument so completely untenable by disregarding the provisions of National Guard Regulation No. 75-16 (Appendix A-5, Brief on Behalf of Petitioners), and the many other Air National Guard and Air Force regulations governing the work and duties of civilian caretakers which show, with reference to the employment of employees authorized under §90, National Defense Act (which later became 32 U. S. C. §709), for the administration and care of material, armament, vehicles and equipment of federal government allocated to National Guard units, that the Secretary of the Army and the Secretary of the Air Force "delegated" their authority to employ, fix rates of pay, establish duties and work hours (not to exceed 40 hours per week), and to discharge such employees, to the several adjutants general of the States, Territories and the District of Columbia, such delegation of authority, however,

to remain subject to the provisions of law and such instructions as may from time to time be isued by the Chief of the National Guard Bureau, a federal agency. No such authority can fairly be compared to the control that a party might have the right to exercise over employees of an independent contractor. Federal officials had the right to control McCoy in the performance of his work and the manner in which the work was done, as shown by the numerous federal regulations issued by the National Guard Bureau and by the Air Force, and did in fact exercise that right.

VII.

As to respondent's "militia" argument.

Respondent asserts that Guard members are clearly excluded from the terms of the Tort Claims Act which bars any claim that military personnel of the Guard are employees of the Government under that Act (U.S. Brief 25). Respondent neglects, however, to discuss *Layne* v. *United States*, 295 F. 2d 433 (7th Cir. 1961), certiorari denied 368 U.S. 990, discussed in detail in the amici curiae brief 39, 40, in which the court held that Major Layne, a member of the Guard of a unit which had not been activated, and who was not employed as a caretaker, was held while engaged solely in a military training mission to be an employee of the United States.

Respondent states (U.S. Brief 27) that McCoy "received pay under this statute "as an air technician, referring to 32 U.S.C. §709. The evidence was not merely that McCoy received pay under that statute but General Wilson testified that McCoy was employed pursuant to it (R. 59). McCoy testified to the same effect, and that the statute correctly described his civilian job (R. 81). Significantly, the air technicians were instructed both by the Department

of the Air Force and by the Air National Guard that as air technicians they are subject to the Hatch Act (R. 143).

Respondent states that only State officials control Guardsmen, in their military and civilian capacities, and that State officials have the exclusive right to employ, promote, demote or discharge these personnel, or to supervise and direct their activities, and that no federal official has authority to perform or exercise these functions (U.S. Brief 34, 35). General Wilson testified that there are no units of the National Guard in existence which have not been federally recognized, that these units have to be federally recognized if they are to receive federal support (R. 313), that all promotions in the unit are subject to federal recognition and consent, that all training in the unit is pursuant to federal procedures and training directives established by the designated agency of the Air Force and approved by the National Guard Bureau, and promulgated by the National Guard Bureau; that all equipment in the unit is federally supplied (R. 314); that the procedures for maintenance of the aircraft are set out in accordance with regulations and standards of the Air Force (R. 314); the Chief of the National Guard Bureau, from the offices of the Bureau in the Pentagon promulgate the Air Force regulations and Air National Guard regulations and McCoy was subject to these regulations in the performance of his work (R. 322). The National Guard Bureau maintained an Air Force advisor at the base where McCoy worked and the advisor's duties were to see that the unit operated and maintained the equipment in accordance with the standards prescribed by the Air Force, and if the unit did not comply with federal requirements, federal recognition would be withdrawn, which would mean the withdrawal of all federal equipment and federal support (R. 324). The Air Force Advisor also flew the planes assigned to the unit in carrying out his responsibility of maintaining certain efficiency standards (R. 365).

Col. Ebaugh, the United States Property and Fiscal Officer, on active federal duty stated that his assistant, Base Supply Officer, Major James I. Considine was located at Martin Field, supporting the unit. Considine was an air technician, occupying the same position as Col. Kilkowski and Captain McCoy, permanent-duty technicians employed at the base. Ebaugh stated that Considine "as a civilian technician . . . was working directly under me." ". . . he answered to me." (R. 247). As to Ebaugh's relationship to Col. Kilkowski, Ebaugh stated that Kilkowski was to see to it that Ebaugh's assistants at the base were properly discharging their duties in support of the air unit (R. 247). Ebaugh usually maintained contact with the base by having his assistant come to Ebaugh's office, but when Ebaugh did go to Martin Field on a few occasions during the year, he would check over the supply procedures, stocks of supplies on hand to support the unit, and meet with his controller there to check on the handling of federal moneys. If he found anything that dissatisfied him, he would cause action to be taken immediately to clear it up. If warehousing was being improperly handled, he would cause personnel working for Major Considine to stop what they were doing and straighten them out. This would consist of technicians working in the supply area for Major Considine, at the base (R. 247, 248).

The regulations of the Air Force which include the Air National Guard regulations govern the unit although the State may expand on the regulations as long as they comply with the federal regulations (R. 331, 332). The United States can bring about the discharge of a civilian employee of the Air National Guard unit if United States concludes that he is not meeting requirements, by stopping his salary (R. 335). The result is that no person becomes and remains a member of the Air National Guard unless he is federally recognized, and if federal recognition pre-

viously granted is taken away from him, it brings about his discharge from the Guard. Col. Kilkowski testified that if an officer was coming into the unit, applying for admission, and held a United States Air Force Reserve commission, his papers would be processed through the National Guard Bureau. If federal recognition was not extended they would have to "get rid of him." (R. 134).

The statement of respondent that the court in the *Meyer* cases held that "because a civilian employee of the Guard is 'paid by' the United States, 'the ultimate right of control over him' is in the United States" (U. S. Brief 45) does not fairly state the position of the court. It would not be necessary to read the opinion to know that the court would not rest its conclusion that McCoy was a federal employee on that narrow ground, that he was paid by the United States, even though that was a factor, to be considered with all the other facts and circumstances, in determining the relationship between the civilian caretaker of federal property, and the federal government. The court rested its conclusion that McCoy was a federal employee, however, on all the facts and circumstances shown by the evidence including the fact that "the ultimate right of control over him was in" the United States; and, "in an ultimate sense the right of control was in the Federal Government at the time and in the circumstances of this accident . . . ." (322 F. 2d 1009, at 1013).

On page 18 of its brief respondent refers to an article entitled "The Militia Clause of the Constitution", 54 Harvard Law Review 181. A reading of the same demonstrates that the modern National Guard is an essential part of the national military arm of our federal government, paid for, equipped and trained by it, and designed as an integral part of our national defense system.

> "The scope of federal control authorized by the 1916 Act completely transformed the Guard. Not

only were the States required to conform to the provisions of the law to obtain federal aid, but they were not permitted to maintain troops at all, except as Congress had provided or as the President might, under the authority delegated to him thereafter direct. And the Guard from now on was not to consist merely of infantry and cavalry units fit only for parades or riot duty. It was to be organized as to form complete higher tactical units. Regular Army officers might be detailed as chiefs of staff of National Guard divisions, and they were authorized to accept commissions in the Guard without prejudicing their commissions as Regulars. More drills were required, and provision was made for a National Guard Reserve.

Nor was that all. The constitutional provision, 'reserving to the States . . . the Appointment of the Officers,' was sharply curtailed by sections of the Act which prescribed the qualifications of National Guard officers, and made provision for their recognition by the federal authorities and for their elimination in case they should be found disqualified. No officer was eligible to receive federal pay unless he was federally recognized. The States might propose; the Army would dispose." (pp. 200-201, footnote omitted)

As was concluded by the author ". . . a well regulated militia is impossible of attainment under the militia clause and can be organized only by resort to the plenary and untrammelled powers under the army clause." (p. 209).

VIII.

As to respondent's "right of control" argument and the Maryland decisions.

The Maryland cases upon which respondent relies (U. S. Brief 48, 49) were discussed in the amici curiae brief, 33, 34, 35, and petitioners will not burden the Court with further discussion of them. Those cases do not support the holding of the Third Circuit under the facts of the *Levin* and *Johns* cases.

Respondent recognizes that a person can be the employee of two employers at one and the same time (U. S. Brief 49) but states that this is a case where McCoy was a "shared servant" with control alternating between the United States and Maryland, and that the right to control McCoy was in the State of Maryland when the accident happened. The question as to who had the right to control and supervise McCoy was considered fully in the *Meyer* cases where Judge Fahy pointed out, 322 F. 2d 1009, 1013-1015, that in accordance with the tests laid down under the law of Maryland, *Keitz* v. *National Paving and Contracting Co.*, 214 Md. 479, 491, 134 A. 2d 296, 301 (1957), the decisive test is whether the employer has the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done and that this right of control was in the United States, notwithstanding the State also could be said to have some supervision of McCoy's activities. And it is appropriate to again note that the respondent admitted in its Petition for the Writ of Certiorari in the *Meyer* cases that "the result reached by the Court of Appeals did not stem from any misapprehension as to State law" (Petn. 22). In *Keitz*, supra, the driver of the truck involved was an employee of Sudbrook, an independent

contractor who agreed to do certain work for National Paving and Contracting Co. The court held that the employee of the independent contractor could also at the same time be the servant of the person who employed the independnt contractor.

In support of its argument that even if McCoy was an employee of the United States when engaged in his caretaker duties, he was also at times an employee of the State of Maryland while engaged in military duties, and that he was engaged in performing military duties when the accident occurred, respondent cites *Fries* v. *United States*, 170 F. 2d 726 (6th Cir. 1948), certiorari denied 336 U. S. 954 (U. S. Brief 49, 50). In *Fries*, a venereal disease treatment project was conducted by and under the control and management of the Louisville and Jefferson County Board of Health of the State of Kentucky, with the aid and cooperation of but without direction from either the United States Public Health Service or the Kentucky Board of Health. It was a local project, 170 F. 2d 726, at 729. The United States Public Health Service had no control over the money, personnel or equipment after its transference to the project (p. 728). The negligent driver, Croslin, was hired locally solely for the project. The complete absence of any control or right to control Croslin on the part of the United States, and the complete absence of any right in the United States to prescribe his duties or responsibilities demonstrate that the *Fries* case does not support respondent's contentions that if McCoy was a federal employee he should be treated as a servant lent to the State of Maryland.

Respondent also cites on this proposition *Pattno* v. *United States*, 311 F. 2d 604 (10th Cir. 1962), certiorari denied 373 U. S. 911 (1963), (U. S. Brief 50, 51). In *Pattno*, the court held, at 606, that a "caretaker" is an

employee of the United States, citing *United States v. Holly*, 192 F. 2d 221 (10th Cir. 1951), and in *Pattno*, footnote 11, the court cited numerous other cases which followed and approved of the decision in *Holly*. The court further held, however, that Meckem, the pilot of the plane, was a flying training instructor engaged at the time of the accident in a flight to evaluate the flying skill of Anderson, a member of the Wyoming Air National Guard, and that while training a member of the National Guard, Meckem was performing work which, under the federal constitution and statutes, was the business and responsibility of the State. Meckem's duties did not include maintenance work or the supervision of the work of maintenance of federally owned airplanes and, although hired under the same statute as McCoy, Meckem had no caretaker maintenance functions or duties. *Pattno* is further distinguishable by reason of the fact that the law of Wyoming under which the case was decided holds that one of the most important tests governing application of the doctrine of "respondeat superior" is "who *had* control over the servants." This test is much more restrictive than the test for "respondeat superior" under the law of Maryland which inquires "who had the *right* of control," and also holds that it is not "the manner in which the alleged master actually exercised his authority to control and direct the action of the servant . . . but it is his *right* to do so that is important;" *Keitz v. National Paving and Contracting Co.*, 214 Md. 479, 491, 134 A. 2d 296, 301 (1957). This broader application of the doctrine of "respondeat superior" under the law of Maryland was relied upon by the court of appeals in the *Meyer* cases.

IX.

As to the Respondent's characterization of the flight.

This Court is informed by respondent that the *flight clearance* "revealed that the purpose of the flight was 'general training, operational training,'" citing (R. 207, 595-596). (U.S. Brief 53). R. 207 contains the flight clearance with the letter "O" in the upper right hand corner in the box bearing the word "mission." At R. 595-596, Kilkowski, on his pretrial deposition, stated that he would have to get the manual to get the exact definition for that symbol, but that it indicates flight in aircraft general training, operational training. It was evident he was not giving the precise meaning of the letter "O," and indicated he would want to refer to the manual for that. On the trial, after he had apparently refreshed his recollection as to the meaning of that symbol, he testified that it would be a "proficiency or operational mission, as opposed to 'X-3' for functional check flight. . . ." Respondent then argues, in effect, that McCoy was on a military training flight, and that the findings of the district court establish that it was "a training flight" (U.S. Brief 53). The findings of the district court do not establish that the flight was a training flight and respondent can point to no language that so holds. In fact its findings are to the contrary. (Dist. Ct. Find. 21, 22, 25, 34) Nor can it be properly stated that it is "uncontroverted" that "proficiency" is military terminology for "training" and is the same as a "training flight" (U.S. Brief 53). Kilkowski, attempting to explain these terms, agreed that training flights are customarily referred to as general proficiency flights or operational proficiency flights, but when asked whether the term "proficiency" meant "training in aerial flights," whether "proficiency" and "training and flying" are synonymous, he attempted to explain these

terms and finally ended up stating "they are very difficult things to try to explain to a layman when they are difficult to understand by pilots" (R. 162).

And respondent errs when it states that it is clear and apparently conceded by petitioners that an officer pilot of the Guard who is a civilian air technician, when flying an airplane on a training mission does so primarily in his military capacity (U.S. Brief 53). Petitioners concede that in order to fly the airplane, under National Guard Bureau and Air Force requirements the pilot requires a military pilot's license, but in flying the plane he does not necessarily perform military work and may, in fact, as the district courts found, and as petitioners claim, perform and carry out his maintenance supervisory work. Petitioners contend that the primary purpose of the flight was definitely not "a military training flight" as respondent contends (U. S. Brief 55), but for the purposes indicated by the testimony of the witnesses and the findings of the district courts which included at least, in part, the performance of McCoy's civilian maintenance duties.

If the Secretary of the Air Force, through the Chief of the National Guard Bureau, could delegate the authority to employ, fix rates of pay, establish work hours, supervise and discharge civilian caretakers, the federal government could withdraw that delegation of authority at any time and perform those functions itself. There can be no doubt that the federal government had and retained the right to control the civilian caretakers. The duties and responsibilities of the Aircraft Maintenance Chief, and of the Maintenance Supervisor, as prescribed by order of the Secretary of the Air Force, could not be changed or modified by state employees, nor could said civilian personnel be relieved of their said duties and responsibilities by any order originating at the state level, from a state official. The manual (ANGM 40-01) provided that its provisions "will govern all Air National Guard civilian employees" (Pltf's Ex. 3, R.

210) Appendix A-11, Brief on Behalf of Petitioners. It is evident that the *right to control* McCoy in his civilian maintenance work, and ultimate authority over him in that capacity, rested squarely with the Secretary of the Air Force and Chief, National Guard Bureau, despite any opinions to the contrary expressed by General Wilson when he gave his deposition as a witness for respondent. It is utterly unrealistic for the respondent to state that no federal officer could empower or supervise the flight (U. S. Brief 54), and, of course, the actual flying of the plane was not supervised by anyone except McCoy himself. His right to fly the aircraft was based upon the fact he had valid flying status orders issued by the United States Air Force for the purpose of flying frequent aerial flights (R. 302).

Respondent attempts to shift the emphasis from control of the pilot to "control of the flight." This does not change matters. Control of the flight as well as of the pilot is basically and ultimately in the United States, as the facts show. Under 32 USC Sec. 110, control is specifically retained by the federal government. Section 110 provides: "The President shall . . . issue orders, necessary to organize, discipline and govern the National Guard."

X.

As to Respondent's contentions that the certification and adjudication by departments of the United States that McCoy was a civil employee of the United States lacked probative weight.

The very significant acts and admissions of the United States following the occurrence showing that the United States regarded McCoy as its employee acting in the scope of his federal employment at the time of the occurrence are accorded only passing and limited reference in a foot-

note in respondent's brief, p. 55. But these admissions extended beyond those mentioned by respondent. Even if the admissions are not conclusive, it is a matter of the weight to be accorded to them, and that was a question for the trier of the facts, the United States District Court that heard and tried the case.

The accident occurred on May 20, 1958. On May 30, 1958, the "Employee's Notice of Injury or Occupational Disease" under the "Federal Employee's Compensation Act" was executed in behalf of McCoy (R. 224, 225). It disclosed that he was employed as an aircraft maintenance chief and was injured in the performance of his duties as the result of an aircraft collision which occurred while McCoy was piloting a jet airplane near Point of Rocks, Maryland. The Department of Labor, acting through William B. Wright, Legal Chief of the Subrogation Branch of the Solicitor's Office of the Department of Labor, wrote to McCoy and sent him an assignment agreement, and would not process his claim until he signed and returned the agreement to the department. The agreement (R. 227), executed pursuant to the provisions of 5 U. S. C. §776, prepared by the Department of Labor, recites that in consideration of payments made or to be made to McCoy by the United States under the Federal Employees' Compensation Act on account of the injuries sustained by him on May 20, 1958, "while employed as Aircraft Maintenance Chief (Pilot) by the Department of the Air Force" McCoy assigns to the United States any right he may have to claim damages against Capital Airlines or any other parties. On May 29, 1958, Lt. Col. Ebaugh, acting in his capacity as a Federal Official, the United States Property and Fiscal Officer, State of Maryland, certified with specific emphasis to the Department of Labor that McCoy:

"was working as a Civil Employee of the United

States at the time of the injury and *not* as a member of the Maryland National Guard." (R. 228)

Thereafter John M. Diggins, a Claims Examiner of the Bureau of Employees' Compensation, Department of Labor, and John J. Stasko, a Management Analyst for the Department of Labor, while acting as Claims Examiner Supervisor in the Bureau of Employees' Compensation which administers the Federal Employees' Compensation Act, whose duties were to oversee the adjudication of the claims arising out of the Federal Employees' Compensation Act, approved McCoy's claim under that statute as a claim sustained by a federal employee in the course of his employment (R. 186, 190, 191). The actual adjudication included a review of the basic forms submitted and a decision that McCoy was in the performance of duty at the time of injury. Robert J. Skahan, Chief of the Subrogation Branch, Office of the Solicitor, Department of Labor, testified that the claim of McCoy was handled and processed the same way all other claims were handled and processed involving employees of the United States injured in the line of duty (R. 17, 23, 24). Col. Ebaugh testified (R. 239) that he is the United States Property and Fiscal Officer for the State of Maryland, is charged with properly handling any federal moneys appropriated to the State of Maryland, that his office processed the permanent duty technician pay roll, maintained the records for those pay rolls, and that his office forwarded records pertaining to Air Technician employees, and processed such papers pertaining to McCoy. These were papers needed by the Bureau of Employees' Compensation in support of any claims in payment of hospitalization that might arise out of an injury. These forms included the individual's report of the accident or the circumstances surrounding the disability (C.A. Form 1), the immediate supervisor's statements (C.A. Form 2), and these were forms of a

general nature used in all instances for technicians. These forms, together with the request for hospitalization (C.A. Form 16), were transmitted to Col. Ebaugh by Col. Kilkowski, and Col. Ebaugh forwarded these forms together with his letter of transmittal to the department of Labor with the certificate he (Col. Ebaugh) executed, stating that McCoy was a civil employee of the United States at the time of injury and not a member of the Maryland National Guard. Col. Ebaugh, who had occupied his position with the federal government since 1955, stated that McCoy as a permanent air technician is a civilian employee and not a member of the Guard during the normal forty hour week (R. 242). After examining the forms submitted to him in connection with McCoy's claim, and the information contained in the forms, Ebaugh believed he was justified in filling out the certification as he did, and these were the forms used for Army and Air Technicians full-time technicians by his office (R. 244, 245).

After the compensation forms were submitted to the Department of Labor with Ebaugh's letter of transmittal, bills were received for hospitalization, and were forwarded to the Department of Labor for payment (R. 249). The Federal Employees' Compensation Act is applicable to all federal employees. It was part of Col. Ebaugh's duties as the United States Property and Fiscal Officer to certify, if it was the fact, that McCoy or any other technicians on "our pay roll" were qualified to apply for compensation. The certificate is required by the Department of Labor (R. 250, 251). When Ebaugh sent in the reports covering McCoy's claim, he knew McCoy had been injured while flying an airplane of the United States (R. 251).

If the Government contended at any time that Col. Ebaugh was mistaken and an error had occurred, the Government could have taken steps to rectify it. This has never been done. It cannot fairly be contended that the administrative award was made without proper con-

sideration of the facts. Mr. Stasko pointed out that all necessary forms were completed, including those required of both the employee and his immediate superior; that he (Stasko) had reviewed the claim of McCoy, in Stasko's position as claims examiner supervisor, and decided that McCoy was in the performance of his duty as an employee of the United States at the time of his injuries (R. 186, 190, 191). Subsequently, at respondent's request and pursuant to statute, McCoy executed an assignment to the United States of his rights against Capital Airlines and others (R. 225-227). No testimony was offered by respondent that a mistake or error was made by Col. Ebaugh or by the Department of Labor in certifying and approving the claim of McCoy for benefits under the Federal Employees' Compensation Act. These forms, including the certificate executed by Col. Ebaugh and the assignment executed by McCoy to the United States, are to be given due weight as records made in the normal course of business under the provisions of 28 U. S. C. §1732. *Pekelis* v. *Transcontinental & Western Air*, 187 F. 2d 122 (2 Cir. 1950), cert. den. 341 U.S. 951 (1951); *Moran* v. *Pittsburg-DesMoines Steel Co.*, 183 F. 2d 467 (3 Cir. 1950); *Quinones* v. *Tropical Beverages*, 74 Puerto Rico Rep. 338 (1953); *Little Fay Oil Company* v. *Stanley*, 90 Okla. 265, 217 P. 377 (1923); *Fitzgerald* v. *Lozier Motor Co.*, 187 Mich. 660, 154 N.W. 67 (1915).

The certificate prepared by Col. Ebaugh is an admission against interest on the part of the United States. *Chicago* v. *Greer*, 9 Wall 726, 19 L. ed. 769 (1870), 20 Am. Jur., *Evidence* § 603, p. 516 (perm. ed. 1939).

The fact that the United States took an assignment from McCoy is also further evidence that he was an employee of the Government at the time of the occurrence. *Pittsburg Construction Co.* v. *Gannon*, 46 App. D.C. 131 (1917). The certification of Col. Ebaugh as to McCoy's status at

the time of the occurrence, the subsequent payment of compensation benefits, and the assignment taken by the United States from McCoy, all must be taken as evidence tending to show that McCoy was an employee of the United States at the time of the occurrence. They are admissions and records made in the normal course of business. As stated in 4 Wigmore, *Evidence*, Para. 1073, p. 999 (3rd Ed., 1940), an employer's business record of an accident to an employee, if it is a statement by himself amounting to an admission, may be received as such irrespective of its satisfying the requirements applicable to business entries.

Respondent attempts to meet the effect of these significant admissions by federal officials that McCoy was injured while working as a civil employee of the United States by stating that the Court of Appeals properly ruled the admission "was not binding or conclusive," and respondent finally states that the admission "clearly had no probative weight . . ." (U. S. Brief 55, footnote 37).

XI.

As to respondent's contention that petitioners expressly disavowed collateral estoppel.

Respondent states that "petitioners expressly disavowed" any claim that "they were entitled to judgment because of the collateral estoppel effect of the *Meuer* judgments in either the district court or in the court of appeals until after the decision of the court of appeals" (U.S. Brief 56, 57). Petitioners did state on February 11, 1963, in making an application for leave to file copies of certain exhibits, that it did not, by making the application, "concede that the decision in the other cases are res adjudicata here." The language used by petitioners did not waive

any right to claim collateral estoppel then or at a future date. The judgment of the court of appeals in the *Meyer* cases entered on June 3, 1963, was called to the attention of the Third Circuit promptly thereafter. At no time have petitioners conceded, nor do they now concede, that any judgment in the *Meyer* cases can operate as res adjudicata against petitioners who were not a party to those proceedings and did not have an opportunity to be heard or offer evidence in those cases. It is not correct for respondent to advise this Court that "petitioners expressly disavowed" any right to claim collateral estoppel based upon the *Meyer* judgment in the district court and the court of appeals.

Conceivably, as respondent urges (U.S. Brief 57, 58), there are situations where it would not be just or equitable to apply the doctrine of collateral estoppel, as in the illustration given by respondent. But that illustration has no validity or application to the present cases which reach this Court in the following posture: three cases were tried together in the United States District Court for the District of Columbia, and at the request of the Government and by agreement of counsel, the issue of agency was tried first in a bench trial; the court conducted an exhaustive inquiry into the facts and the law before holding in favor of the claimants; the Court of Appeals for the District of Columbia Circuit upheld that decision in an unanimous opinion; and this Court denied the petition for a writ of certiorari. The Government surely cannot claim that it did not have its day in court, or that its rights were not fully protected in those judicial proceedings. Every element necessary for the application of the doctrine of collateral estoppel was present. The doctrine of collateral estoppel should be applied against a party who was present, had a full opportunity to be heard and present its defense and did so, and does not contend now that if another trial were held, it would have any new or different evidence to present.

Conclusion

Petitioners submit that the evidence demonstrated that McCoy was flying the airplane in the performance of his work and duties as maintenance supervisor of the 75 to 80 maintenance personnel employed as civilian caretakers of the United States military planes and all other federal property allocated to the unit; that he was performing the duties of the employment when flying the jet airplane involved in the occurrence, acting in the scope of his employment by the federal government under the Federal Tort Claims Act; that McCoy's employer, if a private person, would have been liable under the laws of Maryland for McCoy's negligent acts at the time and place in question.

Respectfully submitted,

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